

In 2016, the United Arab Emirates (UAE) passed a unified and fully codified new Bankruptcy Law (i.e. law no. 9 of 2016). The new Bankruptcy Law has entered into force in December 2016 and offers enterprises and tradesmen a choice between two different sets of insolvency procedures. This choice includes procedural options that were unknown to the Emirates' insolvency law previously, but are notably guided by the latest international legal developments in insolvency law.

In this series of articles titled "UAE's New Bankruptcy Law" we will explain to you the legal techniques of how the new Bankruptcy Law aims at governing entrepreneurial insolvency as well as the specific aspects that entrepreneurs and investors ought to bear in mind with respect to the new legal regime.

The preventive composition procedures as outlined by the UAE's new Bankruptcy Law affords a core advantage in that the debtor will retain his legal power to manage his business within the bounds of the ordinary course of business.

Furthermore, the debtor may apply various procedural tools and rights in order to take substantial influence and shape the outcome of any preventive composition procedures. However, as the new Bankruptcy Law sets a rather brisk pace for preventive composition proceedings the debtor would be well advised to examine his various procedural options to exert influence under the new rules ahead of any impending insolvency.

Part 1 of our series dealt with the aims and the substantial procedural steps of preventive composition procedures under the UAE's new Bankruptcy Law. Based hereupon we will explore in detail which role the debtor takes and how he may take influence on the course and outcome of preventive composition procedures in this article. In that, we will specifically explain the debtor's various instruments and possibilities to influence and shape the intended preventive composition plan as well as the terms and deadlines that must be kept in mind in order to make efficient use of these instruments and possibilities.

Powers and Responsibilities of Debtor and Trustee

Once appointed by the court, the trustee will oversee the preventive composition procedures,

handle all communication and coordination with the court and the creditors and bear the responsibility of collecting all relevant information and data in order to design the preventive composition plan.

Nonetheless, the debtor will stay in charge of operating his business during the course of the preventive composition procedures (cf. Art. 26 para. 1). Thereby the new law is putting the debtor at liberty to manage his business within the bounds of the ordinary course of business. Still, he may not engage in any act of business or transaction that is fit to interfere with the business' corporate structure. Also, the debtor is barred from raising additional credit and clearing single obligations towards distinct creditors.

Apart from these basic principles, both the trustee and the court are entitled and legally empowered to impinge on the debtor's business:

On one hand the trustee wields power to direct over the debtor as far as specific acts need to be carried out in order to preserve the enterprise for the benefit of the debtor's and the creditors' interests (cf. Art. 26 para. 2 and 3). This includes acts like validating and evaluating specific assets within the debtor's enterprise, exacting payment regarding the debtor's due claims as well as negotiating settlements regarding any of the debtor's obligations.

On the other hand the court leading the preventive composition procedures may take or order any measure it deems necessary in order to preserve the debtor's assets and capital (cf. Art. 10). For example, the court may even – upon the urgent request of the trustee – order the partial or full suspension of the debtor's business (cf. Art. 27).

Instruments of Influence for the Debtor

Apart from the unchanged power to manage his business, the UAE's new Bankruptcy Law provides for various rights and instruments for the debtor to exert influence and to shape the outcome of the preventive composition procedures in accordance with his own commercial and economic interests.

* The debtor may nominate candidates to be appointed as trustees by the court (cf. Art. 9

para. 1 and Art. 17 para. 1). Since the trustee's position fulfills numerous administrative and operative functions within the course of the preventive composition procedures, it is in the debtor's best interest to ensure that this position is filled with a trusted and adequately qualified individual. The nomination has to be made together with the application for the opening of procedures.

As the Bankruptcy Law allows for the appointment of more than one trustee by virtue of the court's discretion – specifically up to three trustees per opened proceedings – it may be advisable to extend the nomination to more than one candidate. Thereby the debtor can sustain his influence on this personnel issue even if the court decides to appoint more than one trustee.

The appointment of the trustees per se can not be contested by the debtor. However, the debtor may request the replacement of a trustee, provided that an individual trustee might plausibly prejudice the debtor's or the creditors' interests (cf. Art. 21 para. 1).

★ Also, the debtor has the right to challenge the court's assessment of costs for the proceedings – especially the trustee's fees – and to force the court to review the declared costs and fees (cf. Art. 20 para. 2 and Art. 13 para 4). This constitutes an important right for the debtor, as he is obliged to bear all costs and fees arising from the preventive composition procedures himself. Therefore this right may help the debtor with keeping the procedural costs in check.

Notably, the debtor must deposit an amount of money or a bank guarantee at the court treasury as specified by the court in order to cover the anticipated procedural costs in advance. This deposit or guarantee may even have to be increased if the costs turn out to exceed the deposited or guaranteed amount (cf. Art. 12 and Art. 20 para. 4). So, whenever the debtor has doubts about any occurring costs or fees, he is entitled to a review regarding such costs' and fees' necessity and amount.

★ Furthermore, the debtor can contest any alleged obligation or creditor as compiled and listed by the trustee (cf. Art. 38 para. 1). This may prove to be helpful if any of the claims

against the debtor that have been included on the table of creditors and obligations by the trustee does not or no longer exist or does not exist in the respective amount. The objection to the content of the list has to be filed within seven work days after the publication of the list.

★ Of course, the debtor can participate in drafting the preventive composition plan in accordance with his own restructuring aims and economic interests. He may also monitor any of the trustee's actions and has the right to present and argue for the draft plan in front of the creditors before the creditors' vote on the plan (cf. Art. 40 and Art. 44).

★ Finally, the debtor may within a term of five work days file a grievance to contest the court's decision to reject a preventive composition plan, though the necessary majority of creditors has approved it (cf. Art. 50 para. 2). Thereby, the debtor is able to work towards a successful restructuring, even if the preventive composition procedures tend to derail by virtue of court decision.

Conclusion: Careful Preparation is necessary

Without a doubt, the option to enter into preventive composition procedures in an early stage of financial distress offers various advantages, such as the right to nominate the trustee(s), the outlined possibilities to participate in the procedures and shape its outcome as well as the opportunity to outvote dissenting groups of creditors.

However, one must notice that the terms and deadlines under the new Bankruptcy Law are rather stingy. This calls for proper and cautious preparation even more as the Emirates' courts usually require all documentation to be filed in the original together with an Arab translation. Hence, just supplying all necessary paperwork and translations may most likely result in the failure to meet a deadline.

Eventually, appropriate corporate and bookkeeping structures should be implemented in order to prepare an enterprise for an impending insolvency and the necessary procedural and organizational steps involved under the new Bankruptcy Law. In case of financial distress this

may be of great value in order to enter and handle preventive composition procedures successfully.